No. 99-1159

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

E. K. McDANIEL, Warden, Ely State Prison

Petitioner,

v.

EDWARD F. WILLS, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD F. WILLS, JR.
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Respondent in proper person
Respondent in forma pauperis

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SUPREME COURT, U.S.

E. K. McDANIEL, Petitioner

v.

EDWARD F. WILLS, JR., Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Edward F. Wills, Jr., asks for leave to file the attached brief in opposition to petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals for the Ninth Circuit. No affidavit is attached, inasmuch as the District Court appointed counsel for respondent. Current counsel however, is not yet a member of the Supreme Court Bar.

Respectfully submitted,

Edward F. Wills, Jr., #12394
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

Respondent in proper person

I.

ISSUES RAISED BY RESPONDENT

WHETHER THE ISSUES RAISED BY PETITIONERS HAVE ALREADY BEEN ADDRESSED BY THIS COURT IN A PRIOR DECISION, AND HAVE BEEN RESOLVED IN FAVOR OF THE RESPONDENT

WHETHER THE PETITIONERS CLAIM THAT THE CURRENT FEDERAL HABEAS CORPUS PETITION OF RESPONDENT IS A SUCCESSIVE PETITION CAN BE MAINTAINED UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL

WHETHER THE PETITIONERS HAVE MISTATED THE LAW WHEN THEY RELIED ON STEWART V. MARTINEZ-VALLAREL, IN THEIR PETITION FOR WRIT OF CERTIORARI

II.

ARGUMENT

The petitioner has asked this Court to grant Certiorari based upon, in their view, a violation of the provisions of the Anti-terrorism and Effective Death Penalty Act (AEDPA). This position is flatly wrong. The provisions of AEDPA do not apply retroactively to the Respondent's Petition for Writ of Habeas Corpus. Respondent's Habeas Petition was pending in the Ninth Circuit Court of Appeals (Respondent Wills had been remanded back to state court to exhaust state remedies when AEDPA was passed by Congress) and based upon this Court's own decision in Lindh v. Murphy, 117 S.Ct. 2059 (Amendments to habeas corpus statute by AEDPA did not apply to pending non-capitol cases) the Respondent should be allowed to proceed with his Habeas Petition in Federal Court.

The petitioner has now also taken an inconsistent legal position. During his second federal habeas petition through the federal courts, the petitioner claimed that it was an abuse of the writ. The federal district court agreed and dismissed the petition. The Ninth Circuit reversed this decision. The petitioners are now claiming that the same petition is a successive one. This violates the doctrine of Judicial Estoppel, which bars a party from taking inconsistent positions in the same litigation. See, Morris v. State of California, 966 F.2d 488 (___Cir.), cert. denied 113 S.Ct. 96.

The petitioners have also mistated the law to this court. They have insisted that under Stewart v. Martinez-Vallarel, 118 S.Ct. 1618, the respondent is filing a successive petition when

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he returned to federal court after having his habeas petition dismissed without prejudice so that he would be able to exhaust state remedies. In fact Martinez-Valleral states no such law.

WHEREFORE, Respondent prays that the Petition for Writ of Certiorari be denied.

Dated this 28th day of March, 2000.

By: Edward F. Wills

Edward F. Wills, Jr.
#12394
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

Respondent in proper person
and in forma pauperis

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, declares and certifies that on this date he did personally cause the foregoing Brief in Opposition to Petition for Writ of Certiorari to be placed in the U.S. Mail and addressed as follows:

Frankie Sue Del Papa
Attorney General
State of Nevada
David Sarnowski
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Dated this 28th day of March, 2000.

Edward F. Wills

Edward F. Wills